IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 24100-9-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
ROBERT ELMER GILBERT,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

KATO, J.—Robert Elmer Gilbert was charged with (1) unlawful possession of payment instruments under RCW 9A.56.320(2)(a)(i), and (2) identity theft under RCW 9.35.020(3). After a bench trial, Mr. Gilbert was convicted on both counts. He claims the identify theft statute is unconstitutional and the evidence was insufficient to support his convictions. We affirm.

On February 19, 2005, Richland Police responded to an attempted car break-in. Two officers questioned a man found at the scene. The man told the officers he was borrowing the car from a cousin and the keys were locked inside. When asked about a second person seen trying to get in the car, the man told officers it was his uncle, Bob Gilbert. The man also told the police Mr. Gilbert

was staying in a trailer in the yard of a nearby house.

Before attempting to contact Mr. Gilbert, officers ran a records check on him. The check revealed Robert E. Gilbert had an outstanding arrest warrant. The officers arrested him. A search incident to arrest led officers to discover several blank checks bearing names other than Mr. Gilbert's. The names on the checks led police to a couple living nearby. The couple said the checks had been recently stolen and a female had tried to pass one of the checks for a purchase.

The police obtained a search warrant for the trailer based on the series of checks the couple had reported stolen. While the police did not find anything specifically related to the checks belonging to the couple, they did find miscellaneous mail and tax documents belonging to five other people. These five people did not receive their tax documents by mail, as is the usual custom. They neither knew Mr. Gilbert nor gave him permission to possess their tax documents.

The police also found a check belonging to Roger C. Adams, written to Griggs department store, for $170.00. Mr. Adams, however, said he wrote the check. He gave the check to Mr. Gilbert with the intention of retrieving it later. Mr. Adams was arrested the next day and was thus unable to reclaim the check.

Mr. Gilbert was charged with, and subsequently convicted of (1) unlawful

possession of a payment instrument and (2) identity theft. This appeal follows.

He argues the identity theft statute, RCW 9.35.020, is unconstitutionally vague. He contends the statue fails to describe the conduct that is prohibited while in possession of "financial information" and "means of identification." RCW 9.35.005. He further asserts this ambiguity could lead to arbitrary enforcement, as it would allow a conviction for mere possession while committing a crime unrelated to the fraudulent use of one's identity.

We review statutory construction issues and constitutional issues de novo. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004), *cert. denied*, 544 U.S. 922 (2005). "Under the due process clause of the Fourteenth Amendment, a statute is void for vagueness if either: (1) the statute 'does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed'; or (2) the statute 'does not provide ascertainable standards of guilt to protect against arbitrary enforcement.'" *State v. Williams*, 144 Wn.2d 197, 203; 26 P.3d 890 (2001) (quoting *City of Bellevue v. Lorang*, 140 Wn.2d 19, 30, 992 P.2d 496 (2000)).

The constitutionality of Washington's identity theft statute has not yet been addressed. The issue of vagueness has only been raised in the context of

sentencing guidelines of the identity theft statute. *See State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003). Vagueness, however, has been the basis for challenges to other statutory enactments.

The vagueness doctrine has two principle aims: "first, to provide citizens with fair warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement." *Williams*, 144 Wn.2d at 203; *Lorang*, 140 Wn.2d at 30. A statute is void for vagueness if either of these two requirements is not met. *State v. Halstien*, 122 Wn.2d 109, 857 P.2d 270 (1993).

Mr. Gilbert contends the identity theft statute fails both aspects of the vagueness doctrine. When determining whether the statute provides fair warning of the prohibited conduct, courts examine the context of the entire enactment, giving the language a "sensible, meaningful, and practical interpretation." *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990). Mr. Gilbert was charged with violation of subsection (3) of RCW 9.35.020. To review the statutory scheme under the vagueness doctrine, a review of RCW 9.35.020 is also required. The relevant portions of this section provide:

> (1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

> (2) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.
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> (3) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value that is less than one thousand five hundred dollars in value, or when no credit, money, goods, services or anything of value is obtained shall constitute identity theft in the second degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

RCW 9.35.020.

To address Mr. Gilbert's contention the statute does not sufficiently describe what types of conduct are prohibited, the statute must be read in its entirety. While not a constitutional challenge for vagueness, Division One of this court in *State v. Berry*, 129 Wn. App. 59, 117 P.3d 1162 (2005), addressed the method in which RCW 9.35.020 should be read. The defendant in *Berry* argued the statutory language was ambiguous because he did not "use" his victim's identity. *Id.* at 69. He cited former subsections (2)(a) and (2)(b) of RCW 9.35.020 (2002) as the pertinent portions of the statute.[1] The court in *Berry* held

[1] Mr. Berry's acts were committed in 2003. RCW 9.35.020 was revised in 2004, though the language of (2)(a) and (2)(b) were not altered. The current version incorporated (2)(a) into current subsection (2), and (2)(b) was

the language, "violation of this section," at the beginning of former subsections (2)(a) and (2)(b) referred back to subsection (1). *Berry*, 129 Wn. App. at 70.

When read together, "use" in the present statute's subsections (2) and (3) refer back to language in subsection (1), which clearly states it is unlawful to knowingly obtain, possess, use, or transfer means of identification or financial information in pursuance of criminal activity. RCW 9.35.020. A reasonable person is not left to guess as to the meaning of the statute, as a plain reading of it provides sufficient guidance as to what constitutes criminal conduct.

When applied to Mr. Gilbert's case, the criminal conduct was not any particular use of the personal and financial information. Rather, it was the knowing and unlawful acquisition and possession of tax documents and other forms containing social security numbers with corresponding names, none of which belonged to him. Mr. Gilbert was not arrested while using this information, but was arrested on a warrant and was found to be in possession of these documents. Further investigation revealed Mr. Gilbert was not given permission by the rightful owners of this information to be in possession of their tax documents. The statute is neither unconstitutionally vague or ambiguous as to its meaning, nor was it unconstitutionally applied to Mr. Gilbert.

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incorporated into current subsection (3).

A reading of the statute's other sections adds further clarity to its purpose. RCW 9.35.001 reads:

> The legislature finds that financial information is personal and sensitive information that if unlawfully obtained by others may do significant harm to a person's privacy, financial security, and other interests. The legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain and use financial information. The legislature intends to penalize unscrupulous people for improperly obtaining financial information.

For constitutional purposes, a statute can pass muster if it establishes standards for police to enforce the law in a "non-arbitrary, non-discriminatory manner." *City of Sumner v. Walsh*, 148 Wn.2d 490, 499, 61 P.3d 1111 (2003). Failure to properly define material terms of a statute can render a statute void for vagueness. *See City of Spokane v. Neff*, 152 Wn.2d 85, 89, 93 P.3d 158 (2004).

The identity theft statute defines the types of items that constitute "financial information" and "means of identification." Within the act, "financial information" includes social security numbers and tax identification numbers. RCW 9.35.005(1)(c). "Means of identification" is defined, in part, as "information or an item that is not describing finances or credit but is personal to or identifiable with an individual or other person, including: [a] current or former name of the person . . . a social security . . . or tax identification number." RCW 9.35.005(3).

When the statute is read as a whole, the legislature identified a social problem of identity thieves unscrupulously invading the privacy of others and advanced the public policy that they should be punished as felons. The definitions in RCW 9.35.005 provide police and prosecutors with adequate standards for enforcement. Here, Mr. Gilbert was found to be in possession of tax documents. He was not a tax preparer, and police investigation revealed he was not authorized to possess those documents. The statute provided police with enough guidance to enforce the law in a fair and just manner. It is neither vague nor unconstitutionally applied to him.

Mr. Gilbert also argues the statute is unconstitutionally overbroad as written and as applied. "In order to find a statute overbroad, the statute must prohibit not only unprotected behavior, but also constitutionally protected behavior." *State v. Hood*, 24 Wn. App 155, 160, 600 P.2d 636 (1979). "'A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities.'" *State v. Glas*, 147 Wn.2d 410, 419, 54 P.3d 147 (2002) (quoting *City of Seattle v. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908 (1991)). The First Amendment overbreadth doctrine may invalidate a law on its face only if the law is "substantially overbroad." *Id.* In this analysis, the court

must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. *Id.*

Possession of personal and financial records of others has not been recognized as constitutionally protected behavior. There are numerous legitimate reasons why someone might be in possession of another person's records. For example, accountants, human resources personnel, and tax preparers routinely possess such records in conducting their business. Because it is not constitutionally protected conduct, the legislature can freely attach conditions to the possession of personal and financial records if it has a legitimate purpose.

Mr. Gilbert argues RCW 9.35.020 is overbroad because it fails to clarify whether a person has permission or consent to be in possession of "financial information" or "means of identification." He argues the statute, as written, could subject other persons to criminal prosecution even if they had permission to be in possession of such items. But this is misreading the statute. The legislature did not mention consent, possibly because it sought to include persons with consent to be in possession, who nonetheless used the documents fraudulently. When the statute is read as a whole, the legislature's intent was to punish unscrupulous persons who seek to use the personal and financial records of others to advance

fraudulent activity. RCW 9.35.005.

Because the legislature does not seek to distinguish between persons with consent or permission, and those without, we will not find overbreadth when the legislature had a reasonable basis in not drawing such a distinction. The identity theft statute is not unconstitutionally overbroad as written or in its application to Mr. Gilbert.

The statutory scheme of RCW 9.35.020 is not unconstitutional for vagueness or overbreadth.

Mr. Gilbert also contends there was insufficient evidence to convict him of second degree identity theft. In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Mr. Gilbert claims the evidence was insufficient because it did not establish he was “using” the financial information or means of identification of others, as

prohibited in RCW 9.35.020(3). But the language, "violation of this section," contained in subsection (3) of the identity theft statute must be read with subsection (1), which prohibits one from "knowingly obtain[ing], possess[ing], us[ing] or transfer[ring] a means of identification or financial information of another person . . . with the intent to commit, or to aid or abet, any crime." RCW 9.35.020. When read in this context, it is not only the "use" of such records that can lead to an identity theft charge, but also possession, acquiring, or transferring, when there is intent to commit a crime.

Mr. Gilbert was charged with second degree identity theft because there was no proof he had actually obtained anything of value through the personal and financial records he possessed. *See* RCW 9.35.020(3). The statute still imposes criminal liability even though nothing was obtained through its use.

Mr. Gilbert possessed several "washed" checks. He also had tax documents belonging to five different people, none of whom had given him permission to possess this information. A reasonable inference can be drawn that Mr. Gilbert knowingly obtained and possessed the personal and financial records of others. Further, the jury could infer intent to commit a crime with these documents since Mr. Gilbert had no legitimate reason to be in possession of

them. The evidence was sufficient to support the conviction.

In his additional grounds for review, Mr. Gilbert claims his judgment and sentence are facially invalid. Nothing in the record, however, supports this claim.

He next asserts his arrest and subsequent search of his person was illegal because the police did not have a warrant. The record indicates the police had an arrest warrant. But he argues the arrest warrant was invalid because the Department of Licensing did not afford him a hearing before suspending his license. He bases this claim on facts not in the record. Claims of error based solely on matters outside the trial record are not considered on appeal and must instead be raised in a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

The arrest of Mr. Gilbert was lawful. The police were thus permitted to search him incident to his arrest. *See State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). This is not a basis for reversal.

Affirmed.

A majority of the panel has determined this opinion will not be printed in

the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kato, J.

WE CONCUR:

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Sweeney, C.J.

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Schultheis, J.